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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09 PETER J. MCDANIELS,)
10 Plaintiff,) CASE NO. C12-1289-TSZ-MAT
11 v.)
12 BILL ELFO, et al.,) REPORT AND RECOMMENDATION
13 Defendants.)
14

15 INTRODUCTION AND SUMMARY CONCLUSION

16 Defendants move to dismiss plaintiff's claims against defendant Matt Danz for failure
17 to timely effect service. (Dkt. 236.) Plaintiff objects to the motion. (Dkt. 243.) Having
18 considered the motion and plaintiff's response, along with the remainder of the record, the
19 Court recommends the motion be DENIED without prejudice to the filing of a revised motion
20 to dismiss relating to Danz.

21 By Order dated April 22, 2013, the Court noted its Order Directing Service on Danz had
22 been returned to the Court as undeliverable and began the 120-day time limit for service

01 accounted for in Federal Rule of Civil Procedure 4(m). (Dkt. 134.) The Court advised
02 plaintiff he could use the discovery process to attempt to ascertain the whereabouts of Danz,
03 and indicated that, unless plaintiff provided an address or good cause for the failure to serve
04 within 120 days, his claims against Danz would be subject to dismissal. (*Id.*)

05 Defendants, in their motion to dismiss, point to plaintiff's failure to seek information
06 about Danz through discovery, or any good cause for the failure to serve, and request dismissal
07 of plaintiff's claims against Danz without prejudice. (Dkt. 236.) However, subsequent to the
08 Court's April 2013 Order, plaintiff filed a Second Amended Complaint including Danz as a
09 defendant (*see* Dkt. 142 at 25-26), and defendants responded with an Answer to that pleading
10 on behalf of Danz and other defendants (*see* Dkt. 182 at 1). "A general appearance or
11 responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any
12 defect in service or personal jurisdiction." *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986);
13 *see also* Fed. R. Civ. P. 12(h). Defendants did not, in either of the answers filed in this matter,
14 raise the defense of improper or insufficient service or any affirmative defense disputing
15 personal jurisdiction. (*See* Dkts. 36 and 182.) Nor do defendants, in their current motion,
16 address the question of whether their second responsive pleading, filed on behalf of Danz,
17 served to waive defects in service. The undersigned, therefore, declines at this juncture to
18 recommend dismissal of Danz based on failure to timely effect service.

19 The Court, however, takes the opportunity to pose a different question relating to Danz.
20 Plaintiff avers Danz "is a primary defendant in this case." (Dkt. 243.) However, a review of
21 plaintiff's Second Amended Complaint reveals that Danz is not identified as a defendant in any
22 of the claims that remain pending in this matter, including: three religious practices claims,

01 relating to (i) the denial of Halal meat (Claim 8), (ii) the nutritional adequacy of the Ramadan
02 diet (Claim 3), and (iii) the denial of pain reliever during Ramadan (Claim 5); two
03 conditions-of-confinement claims, concerning (iv) illumination in plaintiff's cell (Claim 14),
04 and (v) nutrition provided by the Whatcom County Jail (Claim 17); and (vi) a claim alleging the
05 destruction of his legal materials (Claim 23).¹ (*See* Dkt. 142.) Indeed, the only claim in
06 which plaintiff named Danz as a defendant – a medical treatment claim regarding “Stroke
07 Symptoms” – has been dismissed. (*See* Dkt. 142 at 25-26, and Dkts. 215 and 232.)

08 Given the absence of any remaining claims against Danz as set forth in the Second
09 Amended Complaint, it appears that he should be dismissed as a defendant in this matter.
10 Again, however, the Court declines to reach a determination on this issue at this time.
11 Plaintiff's Second Amended Complaint operates as a complete substitute for, rather than a mere
12 supplement to, plaintiff's prior complaints. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th
13 Cir. 1992). However, the Court anticipates plaintiff will oppose dismissal of Danz with the
14 contention that he was unable to include all of his claims against this defendant in his Second
15 Amended Complaint due to Court-imposed page limitations. Defendants have not yet
16 addressed the question of whether plaintiff has stated a claim against Danz in any of the claims
17 that remain pending in this case. Should defendants take the opportunity to do so in a second
18 motion to dismiss, they should address the issue of whether Danz is properly considered a
19 defendant in relation to one or more of plaintiff's pending claims as set forth in other pleadings
20 and documents filed in this matter. (*See, e.g.*, Dkt. 4 at 11-12 (original proposed complaint
21 including allegations against “nurse practitioner” in Claim 17, challenging nutritional adequacy

22 ¹ Claim 23 is the subject of a pending Report and Recommendation. (*See* Dkt. 225.)

01 of diet at the jail) and Dkt. 125 at 2 & n.1 (clarifying the identification of Danz as “Nurse
02 Practitioner John Doe 5”).)

03 In sum, the Court recommends the motion to dismiss (Dkt. 236) be DENIED without
04 prejudice to the filing of a revised motion to dismiss relating to Danz. The parties are
05 reminded that the dispositive motion deadline in this matter has been extended to June 27, 2014.
06 (Dkt. 239.) A proposed Order accompanies this Report and Recommendation.

07 DATED this 3rd day of June, 2014.

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10 Mary Alice Theiler
11 Chief United States Magistrate Judge
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